FILED
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SUPREME COURT OF THE UNITED STATES

No. [redacted] 88

B. H. NEWMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

T. Reuben Burnside
P. O. Box 247
Thomson, Georgia
Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES

B. H. NEWMAN, Petitioner vs. UNITED STATES OF AMERICA	PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of B. H. Newman for the writ of certiorari respectfully shows:

1. After conviction and sentence in liquor case involving charge of conspiracy and substantive counts, petitioner appealed to the United States Court of Appeals for the Fifth Circuit and that Court affirmed the District Court for the Southern District of Georgia, the opinion of affirmance being now unreported but a copy thereto is hereto appended, and on April 21, 1955, a rehearing was denied without opinion.

2. The jurisdiction of this Court is invoked on the following grounds.

(a). That the Court of Appeals, in rendering said decision of affirmance and in denying petitioner's motion for rehearing, rendered a decision in conflict with the following decisions of other circuit courts of Appeals;

Kenion vs. Gill (ct. of App. District of Columbia) 1946, 155 F. 2d 176 (5) holding it reversible error for trial court to fail to define various crimes involved in an indictment and to fail to define elements of each, to extent necessary to permit jury to apply the law to the facts.

Morris vs. U. S. (9 C.) 1946, 156 F. 2d. 525 (6, 9), to same effect.

U. S. vs. Levy, (3 C), 1946, 153 F. 2d. 995 (9), holding that in criminal cases the court must instruct on all essential questions of law involved, whether or not the court is requested to do so.

Todorow vs. U. S. (9 C.), 1949, 173 F. 2d. 439 (8), Certiorari denied, 337 U. S. 925.

In the case at bar the trial Judge failed to charge the law relative to any of the 18 substantive counts which followed the conspiracy count in the indictment, failed to define the various crimes involved, and failed to define the elements of each and, petitioner having been convicted on counts 1, 13, 18 and 19, said law was necessarily involved (count 19 being later dismissed by the Court in imposing sentence).

(b). That the Court of Appeals, in affirming the District Court, and in denying a rehearing, in view of the many errors committed by the trial Court, has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the trial Court, as to call for an exercise of this Court's power of supervision. This ground will be more fully set forth hereinafter in the argument amplifying the reasons relied on for the allowance of this writ.

(c) Petitioner was convicted on April 14, 1954, and sentenced on April 19, 1954, and sentence immediately entered.

(d) The date of the judgment of affirmance of the Court of Appeals is March 22, 1955, which was immediately entered.

(e) The date of the judgment of the Court of Appeals denying the motion for rehearing is April 21,

1955, which was immediately entered, and the order of the Court of Appeals granting a stay of mandate to allow time to petition for certiorari is dated 2nd day of May 1955, and its terms in substance, are that mandate is stayed for 21 days from April 21, 1955, and to continue until final disposition by the Supreme Court.

(f) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari, is

28 U. S. C. A. 1254, which provides; "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:....."

3. The questions presented for review are:

(a) Whether or not the trial Court erred in failing to charge the law relative to the substantive counts of the indictment, failing to define the various crimes involved and the elements of each;

(b) Whether or not the Court of Appeals erred in affirming the trial Court in view of the above stated omission to charge, and in failing to grant a rehearing in view of the same omission to charge;

(3) Whether or not the Court of Appeals, in affirming the trial Court and in denying a rehearing, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial Court, as to call for an exercise of this Court's power of supervision; which includes the following questions:

(d) Whether or not the evidence was sufficient to support the verdict and this question, in turn, includes

whether or not the trial court erred in the charge to the jury relative to impeachment; and

(e) Whether or not the trial court erred in identifying the petitioner to the Government witness William D. Williford during the latter's testimony and in the presence and hearing of the jury, and whether or not Williford's testimony should have been rejected for swearing wilfully falsely;

(f) Whether or not the trial Court's charge to the jury was so confusing that the jury was not able to apply the law to the facts; and

(g) Whether or not the Court of Appeals, in affirming the trial Court and in denying a rehearing, committed reversible error as above contended.

4. Involved are the following statutes:

Title 18 U. S. Code, Section 371.

Title 26 U. S. Code, Sections 2803(a), 2810, 2833 (a), 3115, 3116 and 3321. See appendix.

5. Petitioner and four other defendants entered pleas of not guilty to the charges of the indictment and were tried by a jury. The remaining co-defendants were not tried.

The jury returned a verdict of guilty as to petitioner on counts 1, 13, 18 and 19 of the indictment and, accordingly, judgment of conviction was entered as to petitioner on counts 1, 13 and 18 (the remaining count 19 was dismissed by the Court). Petitioner was ordered to serve a term of two years.

(a) The trial Judge failed to charge the jury the law relative to the substantive counts of the indictment, did not charge the jury just what counts were contained in the indictment, the several counts thereof, and did not define the various crimes involved or the ele-

ments of each. The Court of Appeals affirmed the trial Court and denied a rehearing.

(b) It appears that the Government witness William D. Williford was sought to be impeached and that he testified wilfully falsely and his testimony should have been rejected, and the Government witnesses Johnny Washington and Johnny Ward, who testified they bought liquor from petitioner in 1952, failed to identify petitioner and failed to establish the fact that they did buy liquor from petitioner and failed to show that the instances of purchase referred to by them were connected with the offense or offenses charged in the indictment. Williford likewise failed to identify petitioner until after the trial Court identified him for the witness.

(c) It appears that the trial Court, in the charge to the jury relative to the law of impeachment, committed error prejudicial to petitioner. And it further appears that the trial Court's charge to the jury was so confusing as to render the jury unable to apply the law to the facts. These matters will be more fully discussed hereinafter in the argument amplifying the reasons relied on for the allowance of the writ.

6. The basis for federal jurisdiction in the Court of first instance is that the indictment charged a violation of the Internal Revenue Liquor Laws of the United States of America.

7. The law relative to the substantive counts of the indictment was necessarily involved in the case, petitioner was convicted on some of the substantive counts, but the trial Judge did not give in charge to the jury the law relative to same, nor charge the jury just what substantive counts were contained in the indictment, nor define the offenses therein charged or the elements of each, nor of any substantive count or counts contain-

ed in the indictment. This point was raised before the Court of Appeals but, nevertheless, the Court of Appeals affirmed the lower court; and the point was again raised before the Court of Appeals in the motion for rehearing but the Court of Appeals denied the motion for rehearing. In both of its said rulings and decisions the Court of Appeals rendered a decision in conflict with decisions of other United States Courts of Appeals, to wit:

Kenion v. Gill, (Ct. App. Dist. of Col.) 1946, 155 F. 2d. 176 (5)

Morris v. U. S. (9 C.) 1946, 156 F. 2d. 525 (6), (9)

U. S. v.Levy, (3C), 1946, 153 F. 2d. 995 (9)

Todorow v. U. S. (9 C.) 1949, 173 F. 2d. 439 (8), certiorari denied, 337 U. S. 925.

The case of Kenion v. Gill, supra, holds it reversible error for trial court to fail to define various crimes involved in an indictment and to fail to define elements of each, to extent necessary to permit jury to apply the law to the facts;

U. S. v. Levy, supra, holds that in criminal cases the court must instruct on all essential questions of law involved, whether or not the court is requested to do so.

Morris v. U. S., supra, is to same effect and, in the 8th headnote, holds that where contradictory instructions left the erroneous impression with jury that defendant was indicted for two offenses rather than one, as indicated by verdict finding defendant guilty of the "Charges", defendant's right to know with certainty the particular offense of which he had been found guilty was violated. Citing Thomas v. United States, (6C.) 151 F. 2d. 183 (8).

And in the same case of Morris v. U. S. in division

(2-5) of the opinion, page 186, the Court said: ".....It is well settled that appellant had a right to a correct statement of the law from the court. It is of course the duty of the court to explain the law of the case to the jury. Bird v. United States, 180 U. S. 356, 361, 21 S. Ct. 403, 45 L. Ed. 570."

In the case at bar petitioner had a right to a correct statement of the law from the court in the charge to the jury which, of course, he did not get. As a matter of fact, in the charge the court told the jury that they could convict all the defendants on all counts (R. 179).

On the departure from the accepted and usual course of judicial proceedings, we call this Court's attention to the following:

(a) The only evidence which the Government could rely on to tend to connect petitioner with the offense or offenses charged was that of the Government witnesses William D. Williford, Johnny Washington and Johnny Ward. Williford admitted that he had a criminal record involving several separate offenses on which he was sentenced, and admitted that in the case at bar he was a stool pigeon and paid by the U. S. Government man, first testifying that he was paid some $500 or $600 by Government check all at one time, and then testified that he was so employed in the Feutralle case (a similar case tried at a previous term of the court) and that he was paid in the Feutralle case all at one time; then he later testified that he got a check for $75.00 at one time and another for $250.00 (R. 81-83). Thus he necessarily testified wilfully falsely. See following authorities:

Hostetter Co. v. Bower, 74 F. 235, holding that witnesses hired by the manufacturer of a proprietary medicine to secure evidence against suspected infringers are not disinterested and their testimony should be scrutinized with unusual caution;

Where the witness had made irreconcilably conflicting statements under oath, the witness was discredited, Vontilizer v. Jerry Music Co. 53 F. Supp. 191. And see Gumm v. Jerry Vogel Music Co. 158 F. 2nd. 516;

The District Court was obliged to discard the testimony of a witness which involved contradictions and inconsistencies. The S. & P. No. 15, F. Supp. 846.

(b) Also, when petitioner stood up in court during the trial for Williford to identify, before the jury, the Court said "That's him" before the witness ever identified petitioner. So, the Court identified petitioner for the witness (R. 73-4).

The above named Government witnesses Johnny Washington and Johnny Ward testified to buying liquor from petitioner or from a Mr. B. H. Newman, but neither one of them ever identified petitioner. Also the purchases they referred to were, as they said made in 1952, but such purchases were in no way connected with the offense or offenses charged in the indictment, or with petitioner. (R. 100-101 and 102-103). There was no other evidence to connect petitioner.

(c) Relative to impeachment, the court charged the jury, first, as follows;

"Now, gentlement of the jury, the Government has introduced in evidence an indictment against one of the defendants as to a prior conviction. Now, gentlemen, the Government introducted that indictment showing a prior conviction for the purpose of impeachment." (R. 175).

Immediately following the above quoted excerpt from the Charge of the Court the next two paragraphs of the Judge's Charge was on the subject of impeachment. And then, the Judge charged the Jury as follows:

"Gentlemen, just disregard what I charged you with

reference to impeachment because I don't think it would be applicable in this case...." (R. 176).

And at another point the court instructed the jury to disregard what he had just charged in reference to impeachment and immediately thereafter charged the jury as follows:

"However, that indictment that was introduced by the Government was simply for the purpose of impeachment and it was admitted solely on the purpose of impeachment. I do not say that he has been impeached by that indictment in a former case. That is a question for you to determine as to whether or not he has been successfully impeached. That indictment and former conviction or plea of guilty was admitted solely for the purpose of impeachment of defendant Newman and it is solely a question for the jury as to whether or not he has been successfully impeached....." (R. 177).

When the court inquired of Counsel if there were any objections to the charge, petitioner's counsel responded that the court charged the jury with reference to impeachment of witnesses and then withdrew that charge or a part of it from the jury, and that counsel thought the law was applicable to impeachment of the government witness Williford. Petitioner's counsel further stated that "we were impeaching Williford about statements and character and everything else." (R. 181).

Whereupon the court called the jury back into the court room and charged the jury as follows;

"Gentlemen of the Jury, it has been called to my attention that I stated just now in my charge that the only defendant with which there was any question as to impeachment of his testimony was the defendant, Newman, but it has been called to my attention that the witness, Williford, a witness for the Government,

that the question was also asked him about his prior record, and what I charged you as applicable to the defendant, Newman, is also applicable to the witness, Williford. You will remember that I told you just now that the defendant, Newman, was the only one in the case in which there was evidence as to impeachment, but I made a mistake. There was also evidence as to the witness for the Government, Williford, being guilty or having a prior record. I just wanted to correct that mistake, gentlemen. The same charge as to impeachment also applies to the witness, Williford." (R. 182).

The charge of the court as above set forth was error. It was confusing to the jury and undertook to tell the jury to apply to the witness Williford the same charge relative to impeachment which the court had given with reference to petitioner, B. H. Newman, which charge, or the greater part thereof, had been withdrawn from the jury as hereinabove shown. Same was prejudicial to petitioner because it gave the jury no standard by which to determine whether or not the witness Williford had been impeached.

(d) Also, the court charged the jury that they could convict all defendants on all counts of the indictment (R. 179), which was confusing to the jury. And the court charged the jury as follows: "There are nineteen counts in this indictment, nineteen different offenses alleged in this indictment; first, is the conspiracy count, and the others are overt acts" (R. 178). Said charge indicated to the jury that each overt act was a separate count and added to the jury's confusion. The many errors shown above make such a departure from the accepted and usual course of judicial proceedings as to require the supervision of this Court.

8. There is appended to this petition a copy of the opinion of the Circuit Court of Appeals on March 22, 1955, delivered by Judge Dawkins, which is the only

opinion delivered upon the rendering of the judgement or decree sought to be reviewed.

9. Petitioner presents to the Court a certified copy of the entire record and proceedings in the Lower Court.

WHEREFORE, the premises considered, petitioner prays that this Honorable Court grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and that the judgment of that Court be reversed and a new trial granted.

Respectfully submitted,

T. Reuben Burnside
Attorney for Petitioner.

P. O. Address: Box 247, Thomson, Ga.

The facts in the foregoing petition are true to the best of my knowledge and belief; and in my opinion, the assignments of error are meritorious and present questions of such imperative public importance as to warrant the issuance of a Writ of Certiorari.

This_____day of May, 1955.

T. Reuben Burnside
Attorney for Petitioner.

P. O. Address: Box 247, Thomson, Ga.

APPENDIX

Statutes per Rule 23, subparagraph (d) of paragraph 1.

Defendants were charged with a conspiracy (Title 18 U. S. Code, Section 371) to violate the Internal Revenue Liquor Laws (Title 26 U. S. Code, Sections 2803(a), 2810, 2831, 2833(a), 3115, 3116 and 3321), that is, the unlawful manufacture of whiskey, transportation, removing and concealing non-tax-paid whiskey, defrauding the United States of the revenue on the distilled whiskey.

COPY OF OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BEING No. 15049, BEING DELIVERED ON MARCH 22, 1955, BY DAWKINS, DISTRICT JUDGE.

"Appellant Newman[1] and 16 other persons were indicted in Count One for conspiracy to violate federal liguor laws[2]. Appellant was also charged in seven subsequent counts with specific substantive offenses. He was convicted on the conspiracy charge and on four substantive counts[3], and was sentenced to two years' imprisonment. His appeal lists thirteen specifications of error which may be condensed into three general questions: Did the Court err in admitting evidence of appellant's prior convictions for similar offenses? Was there sufficient evidence to support the verdict? Was the charge so erroneous and confusing as to require reversal?

"Appellant testified in his own behalf, and during cross-examination, the prosecuting attorney questioned him at length about prior convictions for similar violations. This was permitted over appellant's objection that his character was not in issue and that the information was not impeaching of any evidence given on direct examination.

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1 "Raiford and Tapley (two co-defendants)" also appealed, but only the appeal of Newman is considered here. Neither of the others perfected his appeal nor filed a brief. Both Newman and the United States treat the other appeals as having been abandoned.

2 18 U. S. C. A. 371; Internal Revenue Code, former sections 2803(a), 2810, 2831, 2833(a), 3115, 3116 and 3321.

3 One count charging possession untaxed spirits, and three counts for removing and concealing spirits with intent to defeat the tax.

"Appellant had, of course, testified as to facts tending to exonerate himself of the charges, and his credibility as a witness was certainly in issue. The evidence of prior convictions was restricted in the offer and in the charge to impeachment of appellant's credibility, and was admissible for that purpose[4].

"In attacking the sufficiency of the evidence, appellant points out that the only direct evidence of his complicity in the crimes was the testimony of one Williford, a member of the "ring". He argues primarily that this informer's testimony is so contradictory and so patently false that the trial judge should have instructed the jury to disregard it.

"Williford testified that he was employed by the Government as a spy or "stool pigeon"; that while hauling whiskey for the group, he used one of appellant's trucks; and that often appellant and others would unload whiskey from the truck into their private automobiles. On cross-examination, this witness became confused and made conflicting statements about the length of his Government "service" and the procedure and amount of his payment. His testimony was clearly admissible; and we need not cite authority for the principle that an attack upon the credibility of a witness, being peculiarly a jury issue, presents nothing for appellate review.

"In addition to the informer's testimony, there is evidence that one of the vehicles seized while transporting untaxed whiskey had been sold to appellant ten days prior to the seizure. There is also the testimony of a witness who said he had bought whiskey from a B. H. Newman, whom he found by consulting the telephone directory. He would not identify appell-

4 Duncan v. United States, 5 Cir., 197 F.2d935; Hargett v. United States, 5 Cir., 183 F.2d 859; Russell v. United States, 5 Cir. 146 F.2d 129; Matthews v. United States, 5 Cir., 145 F.2d 823.

ant personally, but it was shown that only one B. H. Newman was listed in the directory at the time in question and that the address listed under that name matched the place described by the witness. There is, of course, contrary evidence; but we think the record discloses ample evidence to support the verdict.

"In regard to the charge, it is sufficient to say that appellant entered only one objection thereto and that this alleged error was corrected by additional instructions. Nontheless, we have reviewed the charge; and while we agree with appellant that it was not as comprehensive or as clear as it could have been, we think it sufficiently presented the issues to the jury. No patent error or substantial predudice to the appellant is revealed.

"No useful purpose would be served by detailed discussion of complaints made against remarks by the judge during the trial. It should suffice to say that we have examined the record thoroughly and find no reversible error." "AFFIRMED".

I, the undersigned, T. Reuben Burnside, attorney for petitioner in the above and foregoing petition for certiorari, hereby certify that I have this day served said petition for certiorari on Hon. William C. Calhoun, attorney or record for Respondent in said case and United States Attorney for the Southern District of Georgia, by depositing a copy of same in a United States post office, with first class postage prepaid, addressed to him at his post office address, Federal Building, Augusta, Georgia;

And I further certify that I have this day served said petition for certiorari on the Solicitor General of the United States by depositing a copy of same in a United States post office, with first class air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

This the_____ day of May, 1955.

_____

Attorney for Petitioner, B. H. Newman.

P. O. Address:
P. O. Box 247
Thomson, Georgia

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 88

B. H. NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14–16) is reported at 220 F. 2d 289.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1955 (Pet. 14), and a petition for rehearing was denied on April 21, 1955 (Pet. 2). The petition for a writ of certiorari was filed on May 19, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the charge to the jury contained errors so prejudicial as to require reversal of the conviction, although no objections were made as required by Rule 30, F. R. Crim P.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 30 in part provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 (b):—*Plain Error.*

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

The petitioner and five others were tried on a nineteen-count indictment charging in count one a conspiracy to violate the internal revenue laws pertaining to distilled whiskey (R. 1–10), and in the other counts substantive offenses (R. 10–17). The conspiracy charged was the production in unregistered stills of spirituous liquors, upon which no tax was paid, and their transportation and concealment in violation of the internal revenue laws. The substantive charges which re-

lated to petitioner concerned the removal and concealment of distilled spirits in violation of 26 U. S. C. 3321 (R. 14–17). The jury found the petitioner guilty of counts one, thirteen, eighteen, and nineteen (R. 17). The court gave the petitioner a general sentence of two years on counts one, thirteen, and eighteen and dismissed count nineteen (R. 21). On appeal the conviction was affirmed (Pet. 16).

The evidence may be summarized as follows:

William Williford testified that he was employed by Tyler Briggs and in May, 1952, was arrested at an illicit distillery. After this arrest, he agreed to report to Federal officers his future activities in connection with illegal whiskey (R. 63, 64). About a month after his arrest he resumed work for Tyler Briggs and began hauling whiskey for him (R. 67). Williford identified the petitioner in court [1] as the man who furnished him with a truck in which to haul the illicit whiskey (R. 72–73), and who helped him unload it from

[1] Relative to identification of petitioner by Williford, the following took place in court (R. 73–74):

Q. Do you see B. H. Newman in the Court room?

A. Yes, sir.

Q. Which one is he?

A. The white fellow sitting side of the colored boy over there.

The COURT. Let him stand up.

Note: Person standing.

The COURT. That's him.

Q. You identify the defendant, B. H. Newman, there?

A. Yes, sir.

the truck into the cars of the petitioner and others (R. 75–78). On cross-examination, Williford admitted he was a "stool pigeon" (R. 81) in the employ of the United States Government. He gave conflicting evidence as to his remuneration in that he first said he was paid all at one time (R. 83) and later that he was paid a weekly allowance (R. 83) and received two checks at different times (R. 84). He admitted that he had a criminal record (R. 84–85) and a dishonorable discharge from the United States Army (R. 85).

Additional evidence implicating the petitioner was given by a car salesman who testified that he sold petitioner a 1939 Chevrolet panel truck, Motor Number 2524250 (R. 98), and by a deputy sheriff who testified that he seized the same truck ten days after the sale while it was being used to haul 72 gallons of untaxed whiskey (R. 96–97).

Ward, a Government witness, stated that he purchased illegal whiskey in 1952 from a B. H. Newman, whom he contacted by looking up his name in the telephone directory (R. 103). Although Ward refused to identify petitioner in court (R. 103), the Government introduced a 1952 telephone directory which showed only one listing of a B. H. Newman, residing at the address of the petitioner (R. 117).

The petitioner denied having taken any part in the acts charged in the indictment (R. 136). He introduced evidence that he was in the trucking and used car business (R. 127) and an unrecorded

bill of sale with respect to the truck referred to above purporting to show a sale two days before it was seized by the deputy sheriff (R. 132). While the petitioner was on the stand, the Government introduced evidence of two prior convictions for violating the internal revenue liquor laws (R. 141–146).

In the course of the judge's charge to the jury he outlined the specific counts in which each defendant was charged (R. 171–172); explained that the jury was the exclusive judge of the evidence and the credibility of witnesses and that they should take into account the demeanor of the witnesses upon the stand and their interest in the case (R. 173); and defined and illustrated a conspiracy (R. 173–175). He began an explanation of impeachment by prior conviction relative to petitioner and included in his charge an explanation of impeachment of a witness by general bad character, contradictory statements and disproof of facts testified to by him (R. 175–176). The aforementioned portion of the charge he withdrew as not applicable (R. 176). He then recharged that whether the petitioner was impeached by the evidence of his prior convictions, introduced solely to impeach him, was a question of fact for the jury (R. 177).[2] Later, upon re-

[2] "Well, gentlemen, as I stated, just disregard what I said just now relative to impeachment, because I don't think it would be applicable in this case. He hasn't got the decision that he had here yesterday. However, that

quest of the petitioner's counsel (R. 181) the judge recharged the jury that the impeachment charge applied also to the witness Williford (R. 182). In explaining the form of the verdict to the jury, the judge said (R. 178–179):

> * * * There are nineteen counts in this indictment, nineteen different offenses alleged in this indictment. The first is the conspiracy count, and the others are overt acts. You can find either one of these five defendants, or all of these five defendants guilty on all counts, or not guilty on all counts. You can find some of the defendants guilty on some counts and some of the defendants not guilty on some of the counts. If you find all the defendants not guilty on all counts you should so state that in your verdict. If you find some of the defendants guilty on some counts and some of the defendants not guilty on some of the other counts you should so state it in your verdict. But, gentlemen, if, under the evi-

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indictment that was introduced by the government was simply for the purpose of impeachment, and it was admitted solely on the question of impeachment. I do not say that he has been impeached by that indictment in a former case. That is a question for you to determine as to whether or not he has been successfully impeached. That indictment and former conviction or plea of guilty was admitted solely as to the defendant, B. H. Newman, and was admitted solely for the purpose of impeachment of the defendant, Newman, and it is solely a question for the jury as to whether or not he has been successfully impeached. It is solely a question of fact for the jury to determine as to whether or not he has been impeached." (R. 177.)

dence, you find all the defendants guilty on all counts your verdict should so state likewise. * * *

Other than the request relative to having the impeachment charge applied to Williford, the defense counsel made no objections to the charge.

ARGUMENT

1. The petitioner's attack upon the sufficiency of the evidence presents no issue for review by this Court. Ample evidence to support the verdict appears throughout the record. (R. 62–80, 98–99, 100–105, 116–118).

Because the Government witness Williford, who testified against the petitioner, had a criminal record, was a paid agent of the Government, and made inconsistent statements relative to how he was paid, the petitioner urges that the testimony was insufficient to go to the jury (Pet. 8, 9). These factors, however, all went to Williford's credibility and it was for the jury, not the court, to believe or disbelieve him. Cases cited by the petitioner in support of his contention were not jury trials and thus are not in point (Pet. 8–9). Credibility of a witness being peculiarly a jury issue presents nothing for appellate review. Even though it is established that a conviction may rest on the uncorroborated testimony of an accomplice, in this case there was, as shown in the Statement, corroborating testimony. *United*

States v. *Karavias,* 170 F. 2d 968 (C. A. 7).

The record (R. 73) belies the petitioner's statement that the court identified the petitioner for Williford (Pet. 9). It was after Williford had pointed out the petitioner (R. 73), that the court had him stand up (R. 74) and commented, "That's him". (See fn. 1 *supra,* p. 3.)

2. No objections to the alleged errors in the charge to the jury, now urged on appeal, were made during the trial as required by Rule 30, F. R. Crim. P. It is therefore necessary that petitioner show not only error, but an effect upon substantial rights, in order to require reversal under Rule 52 (b), F. R. Crim. P. See *Fischer* v. *United States,* 212 F. 2d 441 (C. A. 10).

Petitioner received a general sentence of two years on all the counts upon which he was sentenced (R. 20). Since the charge on the conspiracy count was ample and that count alone supports the sentence, the alleged failure to instruct the jury as to the nature of the substantive counts is immaterial. Furthermore the jury was given a copy of the indictment (R. 170, 180). The language of counts thirteen and eighteen, "unlawfully, wilfully and knowingly remove and conceal distilled spirits, to wit: * * * gallons, with intent to defraud the United States of the tax on the spirits removed and concealed by them" (R. 14, 16) does not appear to need further explanation in order for the jury to deter-

mine the petitioner's guilt or innocence as to them.

The petitioner also attacks at this time that portion of the charge wherein the judge said the jury could convict all defendants on all counts (R. 178), and that there were nineteen different offenses alleged in the indictment, the first for conspiracy and the rest for overt acts (R. 178) (Pet. 11). The judge had already specified which counts applied to the petitioner (R. 171) and was merely explaining the form of the verdict when he made the statement. The selectivity of the jury's verdict finding the petitioner guilty only on some of the substantive counts shows that the jury were not confused.

The petitioner's contention that the charge as to impeachment was confusing and gave the jury no standard by which to determine whether or not the witness was impeached (Pet. 9–10) is not well founded. The judge instructed the jury that it was for them to decide whether or not petitioner's prior convictions impeached him (R. 177). Upon request, this instruction was also applied to the Government witness Williford (R. 182). Although that portion of the charge relative to impeachment by general bad character, conflicting statements, and disproof of facts had been withdrawn as not applicable (R. 176), the judge had already charged that the jury was the exclusive judge of credibility of witnesses and that they should take into consideration the witnesses' demeanor on the stand and their interest

in the case (R. 173). Thus the charge in its entirely was sufficiently explained as to impeachment of Williford.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE CAPPELLO,
Attorneys.

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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

No. 88

OCTOBER TERM, 1955

B. H. NEWMAN,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Rehearing of Order on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

T. REUBEN BURNSIDE
Attorney for Petitioner
P. O. Box 247
Thomson, Georgia

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 88

B. H. Newman, Petitioner

vs.

United States of America

Petition for Rehearing of Order on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF T. REUBEN BURNSIDE, ATTORNEY FOR PETITIONER, B. H. NEWMAN

The petition of B. H. Newman for rehearing of order on his petition for the writ of certiorari in the above stated case respectfully shows:

1. That on October 10, 1955, this Court denied his petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

2. That petitioner was convicted on count 1 (conspiracy count), and on substantive counts 13 and 18

of the liquor indictment, in the United States District Court for the Southern District of Georgia, Augusta Division. (count 19 on which he also was convicted was dismissed by the Judge in imposing sentence).

3. That the verdict of the jury convicting petitioner as aforesaid was returned on April 14, 1954, and petitioner was sentenced to serve a term of two years in custody of the Attorney General.

4. That the trial Judge failed to give in charge to the jury the law with reference to substantive counts 13 and 18 of the indictment, failed to define the offenses therein charged, or the elements of either.

5. That the conviction of petitioner on substantive counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the law with reference to said counts as aforesaid, was in violation of the 5th Amendment of the Constitution of the United States, in that petitioner was thereby deprived without due process of law, of his personal right not to be convicted by the jury which had heard no definition of said offenses, no explanation thereof, and no charge whatsoever with reference to said offenses contained in substantive counts 13 and 18 on which the jury found petitioner guilty; that the trial was not according to established procedure. (Simons v. U. S., 119 F.2d 539, certiorari denied, 314 U. S. 616).

6. That petitioner's conviction of substantive counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the jury as hereinabove shown, was in violation of the 6th Amendment of the Constitution of the United States, in that petitioner was thereby deprived of his right to a "fair trial" as quaranteed thereunder because each count constitutes a separate offense and petitioner had the right not to be improperly branded by an unauthorized verdict of guilty on said substantive counts, regardless of the

sentence imposed. (Miller v. U. S., 120 F. 2d 968).

7. That while petitioner previously presented to this Court the point that the trial Court erred in failing to give in charge to the jury the law relative to said substantive counts, nevertheless, petitioner did not present to this Court the question that his conviction on said substantive counts, in view of said failure to charge, was in violation of the 5th and 6th Amendments of the Constitution of the United States.

Wherefore, petitioner prays:

(a) That he be granted a rehearing by this Court of the order on his petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit;

(b) That this Court adjudge that his conviction on substantive counts 13 and 18 of the indictment was in violation of the 5th and 6th Amendments of the Constitution of the United States for the reasons hereinabove shown, in that he was thereby deprived, without due process of law, of his Constitutional right to a fail trial;

(c) That the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that petitioner be granted a new trial.

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER

Address:
P. O. Box 247
Thomson, Georgia

I, T. Reuben Burnside, attorney for petitioner in the above and foregoing petition for rehearing, hereby certify that said petition for rehearing is presented in good faith and not for delay; and I further certify that said petition is restricted to the substantial grounds available to petitioner, although not previously presented, that petitioner's conviction on counts 13 and 18 of the indictment, in view of the trial Judge's failure to charge the law relative to same, was in violation of the 5th and 6th Amendments of the Constitution of the United States in that petitioner was thereby deprived, without due process of law, of his right to a fair trial; and that said specific questions were not previously presented to this Court although petitioner did previously present to this Court the objection that the trial Judge erred in not charging the law relative to said counts 13 and 18. This certificate is made in compliance with Rule 58(2).

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER

I, T. Reuben Burnside, attorney for petitioner in the above and foregoing petition for rehearing, hereby certify that I have this day served said petition, with certificate under Rule 58(2) attached, on Hon. William C. Calhoun, United States Attorney for the Southern District of Georgia, and attorney of record for Respondent in said case, by depositing a copy of same in the United States post office at Thomson, Georgia, with first class postage prepaid, addressed to him at his post office address, Federal Building, Augusta, Georgia;

And I further certify that I have this day served said petition for rehearing, with said certificate attached, on the Solicitor General of the United States by depositing a copy of same in the United States post office at Thomson, Georgia, with first class air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

This the_____day of October, 1955.

T. REUBEN BURNSIDE
ATTORNEY FOR PETITIONER